88-636

Supreme Court, U.S.
FILED
SEP 19 1988
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VIRGINIA A. BROBST,

Petitioner

versus

DEAN WITTER REYNOLDS, INC. and
BANK ONE COLUMBUS, N.A.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN DISMISSING PETITIONER'S APPEAL FOR LACK OF APPELLATE JURISDICTION WHERE WELL-ESTABLISHED CASE LAW IN Gulfstream Aerospace Corp. v. Mayacamas Corp., 56 U.S. L.W. 4243 (U.S. March 22, 1988) AND THE THIRD CIRCUIT PROVIDES THAT THE ORDER APPEALED FROM IS APPEALABLE AS A "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. SECTION 1291, THE ORDER IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE OF 28 U.S.C. SECTION 1291, AND UNDER 28 U.S.C. SECTION 1291(a)(1)?

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NO:

VIRGINIA A. BROBST,

Petitioner

versus

DEAN WITTER REYNOLDS, INC.
and BANK ONE COLUMBUS, N.A.,

Respondents

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Virginia A. Brobst, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered July 18, 1988, is unrecorded and appears at page 25 of the Appendix herein.

The Order of the United States Court of Appeals for the Third Circuit rendered June 21, 1988, is unrecorded and appears at page 28 of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered December 4, 1987 is unrecorded and appears at page 29 of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit was dated July 18, 1988 and the Petition for Writ of Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Court rests upon, 28 U.S.C. & 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

28 U.S.C. §1291 at Appendix page 46.

28 U.S.C. §1292(a)(1) at Appendix page 46.

28 U.S.C. §1651 at Appendix page 47.

STATEMENT OF THE CASE

On or about October 20, 1986, Plaintiff filed a Complaint against Dean Writter Reynolds, Ind. (DWR), based upon Defendant's alleged mismanagement of funds Plaintiff entrusted with Defendant, DWR. Plaintiff, a widow, alleges inter alia, that about One Hundred Forty Thousand ($140,000.00) Dollars which Plaintiff entrusted with DWR was negligently mismanaged and given away to unauthorized third persons. Plaintiff therefore filed suit against DWR based upon negligence and breach of contract.

After and agreed-upon extension of time, on or about December 12, 1986, DWR filed an Answer to Complaint and New Matter. In Paragraph 39 of DWR's New Matter, it raised the claim that the dispute was arbitrable, but for the strategy reasons never pursued the claim.

On or about December 19, 1986, DWR filed a Third-Party Complaint against First National Bank of Allentown alleging it negligently honored Plaintiff's checks.

Thereafter, Defendant, DWR, participated in various discovery requests, including but not limited to, extensive depositions of Plaintiff, Virginia Brobst, on March 13, 1987 and Fourth Party Defendants, Helen C. Kapsalis and Christopher Jay King, on August 26, 1987. The several parties to this action filed and answered interrogatories and voluminous requests for production of documents. After two procedural orders, the court set the final discovery deadline at August 31, 1987 and the trial date at October 26, 1987.

After the Court ordered close of discovery, on or about September 10, 1987, Defendant, DWR filed a Motion seeking to compel the matter to contract arbitration

in this matter was never dated and was never porperly countersigned by Defendant, DWR, Appendix page 25 is where it starts.

Plaintiff is an elderly widow who entrusted her husband's life savings with DWR for management. Plaintiff's lone signature appears on the first page of the subject agreement prior to the arbitration provision. (Appendix starts at page 25). Defendant never discussed nor explained the arbitration clause to Plaintiff. Nevertheless, DWR is attempted to compel Plaintiff to arbitrate based upon said provision included somewhere on another page after Plaintiff has signed the first page of the alleged agreement with DWR.

Plaintiff contends that: 1) the arbitration contract is not valid and binding; 2) due to DWR's excessive economic power and possible fraud, the arbitration provision should not be enforced; and 3) even assuming arguendo, a valid contract, Defendant, DWR,

waived the contract arbitration provision by virtue of their conduct in this litigation within meaning of 9 U.S.C. §3.

On December 4, 1987, the United States District Court for the Eastern District of Pennsylvania, per Huyett, J., entered an Order granting Defendant, DWR's motion to compel arbitration.

Plaintiff filed a timely appeal to United States Court of Appeals For the Third Circuit from the Order of the United States District Court granting the Respondent's Motion To Compel Arbitration.

On or about May 23, 1988, by letter from the Court of Appeals, Chief Deputy Clerk, the Court of Appeals directed the parties to address relevance to the appeal of Gulfstream Aerospace Corp. v. Mayacamas Corp., 56 U.S. LW. 4 243 (U.S. March 22, 1988). The Third Circuit did not permit oral argument on the matter.

At least one other case Dorothy Zosky v. Daniel Boyer and Boenning & Scattergood at No. 87-1782 dealing with the appealability of order compelling arbitration after Gulf-stream is currently pending before this Third Circuit. In Zosky, oral argument was held on May 31, 1988 before the Honorable Dolores K. Sloviter, Honorable William D. Hutchinson, and the Honorable Collins J. Seitz. No Decision has been rendered in that case.

Appellant respectfully requested a rehearing before the Honorable Court of Appeals either en banc or by the panel in accordance with Rule 40 of the Federal Rules of Appellate Procedure.

On July 18, 1988, the Court of Appeals for the Third Circuit denied Plaintiff's Petition for Rehearing. Plaintiff thus seeks review of the appellate order denying rehearing. Plaintiff's Petition for a

Writ of Certiorari is now before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 1711(a) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflice with the decision of another federal court of appeals on the same matter as to call for an exercise of this Court's power of supervision.

ARGUMENT

WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW IN DISMISSING PETITIONER'S APPEAL FOR LACK OF APPELLATE JURISDICTION WHERE WELL-ESTABLISHED CASE LAW IN THE GULFSTREAM AEROSPACE CORP. vs. MAYACAMAS CORP., 56 U.S. LW. 4 243 (U.S. March 22, 1988) AND THIRD CIRCUIT PROVIDES THAT THE ORDER APPEALED FROM IS APPEALABLE AS A "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. §1291, THE ORDER IS IMMEDIATELY APPEALABLE UNDER THE COLLATERAL ORDER DOCTRINE OF 28 U.S.C. §1291 AND UNDER 28 U.S.C. §1292 (a)(1)?

The Court of Appeals dismissed Plaintiff's Appeal from a district court order compelling contract arbitration. The Court relies upon Gulfstream, supra. and Comm. Ins. Co. v. The Underwriters, Third Circuit Opinion NO. 88-5056 filed May 16, 1988. See Appendix page no. 28.

Plaintiff respectfully submits that the Court of Appeals misapprehended the relevance of Gulfstream and Commonwealth to Plaintiff's appeal.

a) In Gulfstream Aerospace Corp., supra. a California Corporation refused to make payments on aircraft it contracted to purchase from a Georgia corporation. The Georgia corporation filed suit in Georgia State Court for breach of contract. The California corporation then filed suit in Federal Court in California for breach of the same contract. The Georgia corporation moved for a stay or dismissal of the Federal action because of

the pendency of similar litigation in State court. The District Court denied the Georgia corporation's motion.

The Court of Appeals dismissed the appeal. Affirming the dismissal of the appeal, the United States Supreme Court held that 1) a Federal District court order denying a motion to stay or dismiss an action because of similar state court suit is not immediately appealable as a collateral order under 28 U.S.C. Section 1291 or 2) an denial of injunction under 28 U.S.C. Section 1292(a)(1).

b) On May 16, 1988, after consideration of Gulfstream, the Third Circuit filed its opinion in Commonwealth Ins. Co. vs. The Underwriters. Commonwealth involved an appeal from a district court order staying proceedings between Commonwealth and one Defendant.

Court of Appeals for the Third Circuit dismissed the appeal holding that it

lacked appellate jurisdiction. The Court reasoned that: (1) Commonwealth failed to staisfy the first of three requirements for appeal under the collateral order exception to the final decision Rule of Section 1291(2) without certification by the district court, it had no authority to hear a question pursuant to Section 1292(b); and (3) circumstances did not warrant issuance of a writ of mandamus.

1. The Gulfstream and Commonwealth decisions are not relevant to the appealability of the order as a final decision under Section 1291. Review under the final decision Rule of Section 1291 remains available in this case. Like the United States Supreme Court in Gulfstream, the Court of Appeals in Commonwealth did not address the issue of whether or not an order compelling arbitration is a final decision under 28 U.S.C. Section 1291, and thus immediately appealable.

Well-established case law in the Third Circuit clearly indicates that the Order is immediately reviewable as a final decision under Section 1291. Please see, Gavlik v. H.G. Campbell, Inc., 526 F.2d 777 (3rd Cir, 1975) and its progeny. Plaintiff/Petitioner respectfully submits that the appellatecourt order denying jurisdiction in this case disregards well-established case law of Gavlik and its progeny.

The appellants in Gulfstream and Commonwealth apparently did not even contend that the orders of which they sought immediate review were final decisions under Section 1291. In both cases, the courts repeated the general rule that an order that does not end the Federal Court litigation on the merits but is entered as part of a continuing proceeding for other relief is not a "final decision" under Section 1291. Then each court proceeded to decide the Section 1291 issue before it which was whether or not the order was appealable

under the collateral order exception to section 1291.

Both Gulfstream and Commonwealth involved factual situations and legal issues which are distinct from the case at bar. Here, the order from which Plaintiff appeals is tantamount to a dismissal of the Federal Court action. The legal issue here, whether or not such order remains appealable as a final decision under Section 1291, was not addressed in either case. Hence, the order here remains appealable as a final decision under Section 1291. In dismissing this appeal, the Third Circuit did not state why the order appealed from is no longer a final decision under Section 1291.

2. The well-established case law in the Federal Court of Appeals provides that the Order in this case is a "final decision" within the meaning of Section 1291.

In Goodall-Sanford v. Textile Workers, 353 U.S. 550, 77 S. Ct. 920, 1 L.Ed.2d 1031 (1957) the United States Supreme Court held

that an order directing arbitration in a suit brought under Section 301(a) of the Labor Management Relations Act of 1947, U.S.C. Section 1859 was appealable. The Court reasoned that..."...(a)rbitration is not merely a step in judicial enforcement of a claim nor auxillary to a main proceeding, but the full relief sought. A degree under Section 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' within the meaning of 28 U.S.C. Section 1291," 353 U.S. at 551-552 77 S.Ct. at 921.

The Third Circuit Court of Appeals followed the Goodall-Sanford decision in Rogers v. Shering Corp., 262 F.2d 180, 182 (3rd Cir, 1959), cert denied, 359 U.S. 991, 79 S.Ct. 1121, 3 L.Ed2d 980 (1959) where this Court stated in a commercial arbitration context:

> "It is settled that any order for arbitration is a final appealable decision where it is not merely a step in the judicial enforcement of a claim nor auxilliary to a main proceeding but is the full relief sought."

The order compelling commercial arbitration here, like the order compelling labor arbitration in Goodall-Sanford , supra, represents the full relief sought by Defendant in this case. Please see, Gavlik Construction Company v. H.F. Campbell Company, supra, where this Court stated that:

> "Once the parties were directed to arbitration, judicial involvement in the controversy for all practical purposes ends, as it is the arbitrator who then resolves all matters in dispute. Hence, the arbitration order...being neither a step in the judicial enforcement of the disputed claims nor auxilliary to any main proceeding, is a final decision over which we have jurisdiction pursuant to 28 U.S.C. Section 1291."

The order compelling arbitration here is thus a "final decision" under 28 U.S.C. Section 1291.

As the Court of Appeals explained in Rogers vs. Shering Corp, supra:

> "It would appear that the underlying rationale of the cases, although not often expressed in these terms, is that an order directing arbitration is interlocutory and therefore, not appealable if it is made in a lawsuit, such as a suit for damages, in which in the

> normal course of judicial procedure, there will be a later final order or judgment from which an appeal can be taken by a person aggrieved by the prior order to arbitrate. If however, the order to arbitrate will not in the normal course of procedure be followed by another judicial order which will be required to carry the arbitration award into effect, the order to arbitrate must be regarded as final if the right to review it on appeal is to be given."
>
> Id. at 182

The latter is the situation in this case on appeal. If the order compelling arbitration stands and the parties carry out an arbitration, the arbitration award will not require judicial approval or a court decree to put it into effect. The decision of the arbitrators will be binding. Therefore, unless Plaintiff now has a right to appeal from the order compelling arbitration, she will in all probability never be able to secure an appellate review of that order. See, Rogers v. Shering Corp., supra.

The district court order compelling arbitration is a final appealable order because it was NOT made in a continuing suit which sought other relief against Defendant, Dean Witter

Reynolds. The order put Plaintiff "effectively out of court." Moses H. Cone Memorial Hospital vs. Mercury Construction Corp, Inc., 460 U.S. 1, 74 L.Ed2d 765, 103 S.Ct. 927 (1983).

The Gulfstream and Commonwealth's decisions do not address and thus in no way alter the appealability of "final decision" under Section 1291. No grounds exist to alter clearly established legal precedent on this issue.

3. The Order dismissing Appellant's appeal contradicts well-established Third Circuit law. Rogers v. Shering Corp., supra; Gavlik, supra; United Steelworkers of America v. Canton, Inc., 580 F. 2d 77 (3rd Cir, 1978); Par Knit Mills v. Stockbridge Fabrics, 636 F.2d 51 (3rd Cir, 1980); Goodwin v. Elkins & Co., 730 F.2d 99 (3rd Cir, 1984); Towers, Perrin, Forster & Crosby, Inc., v. Brown, 732 F.2d 345 (3rd Cir, 1984); and numerous other Third Circuit cases. Neither Gulfstream or Commonwealth support an abandonment of the aforesaid precedent. Hence,

Plaintiff's Petition for a Writ of Certiorari ought to be granted.

4. The collateral order doctrine under Section 1291 is also a proper basis for appeal in this case. The collateral order doctrine allows appeals under Section 1291 if the order: (1) conclusively determines the disputed question; or (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. Cooper & Lybrank v. Livesay, 437 U.S. 463 468 (1978); Cohen vs. Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L.Ed 1528, 69 S.Ct. 1221 (1949) and its progeny.

Here, the order compelling arbitration satisfies those three requirements. For the reasons stated above, the order: (1) was made with the expectation that it will be the "final word on the subject" (Moses H. Cone Memorial Hospital, supra.) (2) determines claimed rights which are not ingredients of

the cause of action, (Cohen v. Beneficial Industrial Loan Corp., supra)and (3) is effectively unreviewable on appeal from a final judgment. This order is thus appealable under the collateral order doctrine.

In Gulfstream, the United States Supreme Court applied the three requirements of the collateral doctrine to the facts before it. Those facts are distinct from this case, as aforesaid.

In Commonwealth, the Court of Appeals found that the reviewability of the arbitration of the arbitration clause would be available upon appeal from the final judgment after arbitration and the district court proceedings are concluded.

This case is factually distinct. Here, Plaintiff seeks immediate review of an order which denies her her right to trial by jury, and forces her to plead her case before an arbitration panel whose decision is binding. Hence, Commonwealth does not alter this

Plaintiff's right to appeal under the collateral order doctrine.

To the extent the Court of Appeals for the Third Circuit found the Commonwealth decision applicable to this appeal, Plaintiff respectfully submits that the Commonwealth decision is not supported by Gulfstream and should be overturned. Hence, Plaintiff respectfully seeks review of the Court of Appeal's denial of her petition for rehearing.

5. Review under Section 1292(a)(1) remains available in this case.

The Gulfstream decision is relevant to this appeal in that by implication, it confirms the appealability of the district court order compelling arbitration under 28 U.S.C. Section 1292(a)(1). The Commonwealth decision does not address this issue.

After reviewing the history, inadequacies and inequities in the current application of the Enelow-Ettelson rule, the United States Supreme Court held "that orders granting or

denying steps of 'legal' proceedings on 'equitable' grounds are not automatically appealable under Section 1291(a)(1)." Gulfstream, supra.

The Supreme Court opinion, however, goes on to confirm federal appellate court jurisdiction over this appeal under Section 1292(a)(1). Stressing the limits of its holding in Gulfstream and the continuing viability of other immediate appeals, the Supreme Court stated:

> "This holding will not prevent interlocutory review of district court orders when such review is truly needed. Section 1292(a)(1) will, or course, continue to provide appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunction and have 'serious, perhaps irreparable consequences'. (citations omitted). As for orders that were appealable under Section 1292(a)(1), solely by virtue of the Enelow-Ettelson doctrine, they may, in appropriate circumstances, be reviewed under the collateral order doctrine of Section 1292 (citations omitted), and the permissive appeal provision of Section 1292 (b), as well as by application for writ of mandamus. Our holding today merely prevents interlocutory review of district court orders on the basis of historical circumstances that have no relevance to

modern litigation." (emphasis added).

Gulfstream Aerospace Corp.
99 L.Ed2d at 312, (1988).

The Supreme Court specifically noted that in exceptional cases such as this, where the stay order deprives a party of the right to trial by jury, the reasoning and holding of Gulfstream does not affect the appealability of such district court orders. See, 99 L.Ed.2d at 312 and footnote 13.

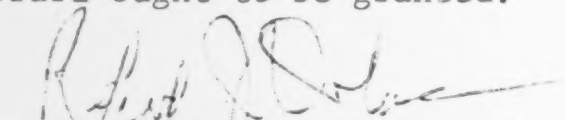
The Gulfstream decision thus implicitly reaffirms the right to immediate appeal of this order under Section 1292(a)(1) where Plaintiff's right to trial by jury might otherwise be lost.

6. Issuance of writ of mandamus is appropriate in this exceptional case. Finally, if the order compelling arbitration is not an appealable one, the Gulfstream and Commonwealth decisions are relevant to this case in that the decisions support Plaintiff's request herein that her appeal be treated as a petition for a writ of mandamus under Section 28 U.S.C. Section 1651.

Serious hardship and prejudice will result from the district court order compelling arbitration. The issuance of a writ of mandamus is appropriate in this exceptional case because the order deprives her of her right to trial by jury. See, Beacon Theatres, Inc., v. Westover 359 U.S. 500, 510-511, 2 L.Ed2d 988 79 S.Ct. 948 (1967), as cited in footnote 13 of Gulfstream . Thus, if the district court order is not appealable, Plaintiff respectfully requested the Court of Appeals to issue a writ of mandamus directing the district court to vacate the order and to deny the motion to compel arbitration. The Court of Appeals denied Plaintiff's request. Hence, Plaintiff respectfully petitions for a writ of certiorari.

CONCLUSION

For the foregoing reasons, this Petition For A Writ of Certiorari ought to be granted.



Richard J. Orloski
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO: 88-1006

VIRGINIA A. BROBST,

Appellant

vs.

DEAN WITTER REYNOLDS, INC.
and BANK ONE COLUMBUS, N.A.,

Appellee

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

/S/ Carol Los Mansmann
Circuit Judge

July 18, 1988.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 88-1006

BROBST, VIRGINIA A.,

Appellant

vs.

DEAN WITTER REYNOLDS, INC., and
BANK ONE COLUMBUS, N.A.,

vs.

FIRST NATIONAL BANK OF ALLENTOWN

vs.

KING, CHRISTOPHER JAY and
KAPSALIS, HELEN C., trading
as THOMAS DINER

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 86-6077)
District Judge: Honorable Daniel H. Huyett, 3rd

Submitted
June 17, 1988
Before: MANSMANN, SCIRICA, and COWEN, Circuit Judges

ORDER

Upon consideration of the parties' submissions regarding the effect upon jurisdiction of the Supreme Court's recent decision in Gulfstream Aerospace Corp. v. Mayacamas Corp., 108 S.Ct. 1133 (1988), and our recent decision in Commonwealth Insurance Co. V. The Underwriters, No. 88-5056 (May 16, 1988), we find that the Order appealed from is interlocutory and that we lack appellate jurisdiction, and it is hereby ORDERED that the appeal is dismissed.

Each party to bear its own costs.

BY THE COURT,

/S/ Carol Los Mansmann

Attest:

/S/ Sally Mrvos, Clerk
June 21, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGINIA A. BROBST, : CIVIL ACTION
: NO: 86-6077
vs. :
:
DEAN WITTER REYNOLDS, INC., et al. : Filed Dec. 7, 1987

MEMORANDUM AND ORDER

HUYETT, J. December 4, 1987

This is a diversity action brought by Plaintiff, Virginia A. Brobst for the alleged wrongful honoring of altered checks. Defendants in this action are Dean Witter Reynolds, Inc. (DWR), a securities investment firm, and Bank One Columbus, N.A. (Bank One), a bank with its principle place of business in Columbus, Ohio. Presently pending before the court is a motion by Defendant, DWR, to stay these proceedings and compel arbitration[1]. For the reasons stated below, defendant's

motion is granted.

1. Facts:

In January of 1985, plaintiff deposited approximately $50,000.00 in an "Active Assets Trusts and Insured Account" with defendant, DWR. (Plaintiff's Complaint, para. 5). Plaintiff deposited this money with DWR pursuant to an agreement by which plaintiff would deposit money with DWR for investment and management purposes. (DWR's Answer and New Matter, para. 8). Thses monies were, in turn, deposited by DWR with Bank One. (Plaintiff's Complaint, para. 7). Plaintiff had the right to claims that DWR was negligent and breached its contractual duties by honoring altered checks or permitting the same to be negotiated when DWR knew or should have know that the checks were altered. (Id. at 20, 26).

The above mentioned agreement contained a clause pursuant to which the plaintiff and DWR agreed that,

> any controversy between DWR and (the plaintiff] arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules...of either the American Aribtration Association, or the Board of Arbitration of the New York Stock Exchange, as I may elect. If I do not make such election by registered mail addressed to DWR at DWR's main office within five (5) days after receipt of notidication from DWR requesting such election, then I authorize DWR to make such an election on my behalf. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators... shall be final, and judgment upon the award entered in any court, state or federal, having juriscition.

(Active Asset Account Agreement attached as Exhibit "A" to DWR's motion for stay.)

According to the plaintiff, the defendants negligently honored altered checks drawn on the Bank One Account during May 1986. (Plaintiff's Complaint, paras. 11-15). This

suit is brought on October 17, 1986. On December 12, 1986, Defendant DWR filed its answer in which it raised the arbitration clause as a new matter. (DWR Answer and New Matter, para. 39). On December 22, 1986, defendants brought a third party complaint against the First National Bank of Allentown, the bank to which the altered checks were originally presented. The First National Bank, in turn, impleaded Christopher King and Helen C. Kapsalis, who maintained the checking account into which the altered checks were deposited.

On January 12, 1987, I issued a procedural order setting a discovery deadline, a trial date and final pretrial conference date. This order was amended twice. The ultimate discovery deadline was August 31, 1987 (Procedural Order dated January 12, 1987) and the trial date was October 26, 1987). (Procedural Order dated August 31, 1987.) This trial date has since been cancelled and has not yet been rescheduled.

The parties have engaged in limited discovery. Depositions of the plaintiff and the fourth party defendants were taken on March 13, 1987 and August 27, 1987, respectivly. The parties also exchanged interrogatories. (DWR's reply to palintiff's brief in opposition to motion to compel arbitration at 6).

Eleven months after plaintiff filed her complaint, DWR filed its motion to stay these proceedings and to compel arbitration pursuant to sections three and four of the Federal Arbitration Act, 9 U.S.C. Section 1, et seq.

2. Discussion :

The Federal Arbitration Act, 9 U.S.C. , Section 1 et seq. was passed by Congress to "reverse centuries." Scherk vs. Alberto-Culver Co., 417 U.S. 506, 510 reh. denied, 419 U.S. 885 (1974). This purpose is

accomplished by Section 2 of the act which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of a contract." The act also directs that a court must stay its proceedings if it is satisfied that an issue before it is arbitrable. 9 U.S.C. Section 3. Finally, the act authorizes a federal court to issue an order compelling arbitration if there has been a "failure, neglect, or refusal," to comply with the arbitration agreement. 9 U.S.C. Section 4.[2]

The Federal Arbitration Act represents the well-established federal policy favoring rapid and unobstructed enforcement of arbitration agreements. Shearson/American Express, Inc. v. McMahon, slip op. at 5 (U.S. June 8, 1987);

Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 625 (1984); Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395, 404 (1967). Arbitration is a strongly favored alternative method of dispute resolution. Perry v. Thomas , 55 U.S.L.W. 4832, 4834 (US June 15, 1987). As stated by the United States Supreme Court, "the preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," which concern "requires that we rigorously enforce agreements to arbitrate". Dean Witter Reynolds v. Byrd, 470 U.S. 213, 221 (1985).

In the face of this strong federal policy favoring arbitration, plaintiff argues that defendant's motion to compel arbitration should be denied for the following reasons: 1) no agreement to arbitrate exists because the contract containing the arbitration clause was never

signed or dated, 2) the arbitration clause is not enforceable because of DWR's "excessive economic power and possible fraud," and 3) DWR waived its right to seek arbitration by participating in this suit. I will discuss these arguments seriatim.

a. Signature/Date

Plaintiff's first argument that there was never any agreement to arbitrate because the Active Assets Account Agreement was never signed by DWR or dated is wholly without merit. First, the contract was signed on the first page of the agreement by George R. Haddad, a representative of DWR. (Active Assets Account Agreement attached as Exhibit "A" to DWR's Answer and New Matter.) Second, a contract is formed when the parties have agreed upon the essential terms and conditions of the agreement. Channel Home Centers vs.

Grossman, 795, F.2d 291, 299 (3rd Cir, 1986). A written contract need not be dated to be valid because the date of the making of a contract is not an essential term or condition. See, Harvey vs. Minadeo, 37 Erie 102 (1954).

b. Fraud/Excessive Economic Power:

Plaintiff's second argument, that the contract is unenforceable because of DWR's excessive economic power and possible fraud is also without merit. Any argument that an arbitration agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract" must be "well-founded." Mitsubishi Motors, 473 U.S. at 627 (citations omitted). The only facts raised by the plaintiff is an elderly widow, that defendant never discussed the arbitration clause with her, and the plaintiff did not sign the page on which the arbitration clause is located, but signed the preceeding page.[3]

The plaintiff has pointed me to no facts which would support a well-founded claim of fraud in the inducement. Plaintiff was given a copy of the contract. The contract is relatively simple to read and its terms are easily located. In fact, the plaintiff was referenced to the arbitration clause by a notice located directly above the plaintiff's signature which reads "I hereby assent and agree to all the terms and the conditions of the Agreement appearing above and as continued on the reverse side Hereof." (Active Assets Account Agreement attached as Exhibit "A" to defendants' motion to compel).

Further, insofar as plaintiff's argument is a general attack on the validity of the contract, it is insufficient to prevent the defendants from successfully invoking arbitration. A claim of fraud in the inducement of the contract is insufficient to prevent the case

from being sent to arbitration. Prima Paint Corp., 388, U.S. at 402-04. Such a claim is referable to the arbitrator. Id.

c. Waiver:

The most substantial ground raised by plaintiff in opposition to arbitration is that defendants waived their right to invoke the arbitration clause by participating in litigation. However, the waiver of the right to arbitration is not to be lightly inferred. Gavlik Construction Co. v. H.F. Campbell Co., 526 F.2d 777, 783 (3rd Cir, 1975); Coleman v. National Movie-Dine, 449 F.Supp. 945, 947 (E.D. Pa. 1978). As stated Moses H. Cone Hospital, "[t]he Arbitration Act established that...any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses v. Cone, 460 U.S. at 24-25.

According to the third circuit, merely answering on the merits, asserting a counterclaim or participating in discovery does not necessarily constitute a waiver of arbitration. Gavlik, 526 F.2d at 783. Nor does filing of a third party complaint constitute waiver. Id. As stated by the second circuit in a case similar to the one at bar, the defendant's filing of a third party complaint was "apparently an attempt to bring all parties in interest into court where their rights and liabilities could be adjudicated, if necessary, in proceedings following the termination of any stay granted pending arbitration. Such action did not indicate [sic] an intention on the part of [defendant] to abandon its right to insist on arbitration, which it already alleged as a defense and so fell short or waiving it." Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625, 628 (2nd Cir. 1945);

see also Gavlik, 526 F.2d at 783 (third circuit held that the defendant had not waived arbitration despite its filing of a third party complaint).

The ultimate test "is not the inconsistency of a party's actions, but the presence or absence of prejudice which is determinative of the issue of waiver." Gavlik, 526 F.2d at 783. Waiver will not be inferred unless one's conduct has gained him an undue advantage or resulted in prejudice to another. Vespe Contracting Co. v. Anvan Corp., 399 F.Supp. 516, 522 (E.D. Pa. 1975).

Although defendant did not file their motion to compel arbitration for ten months after the plaintiff filed her complaint and participated in limited discovery, the defendant did put the plaintiff on notice that it was asserting the arbitration clause as a defense by pleading the arbitration clause as a new matter in its answer. Further,

defendant DWR's asserting a third party complaint does not constitute a waiver of arbitration. More importantly, however, plaintiff does not allege that the defendant's delay in bringing the motion to compel arbitration resulted in any advantage to the defendant or prejudice to herself. Without such a showing, the defendant's conduct, although seemingly inconsistent, does not suggest that it has "intentionally relinquished [its] right to arbitration." G & V General Contractors Inc. v. W. Wilson Goode, slip op. at 11 (E.D. Pa. April 21, 1987; compare Liggett & Myers, Inc. v. Bloomfield, 380 F.Supp. 1044 (S.D.N.Y. 1974).

Conclusion:

In light of the strong federal policy in support of arbitration as an alternative dispute mechanism, the lack of any evidence

that plaintiff signed the contract as a result of fraud and plaintiff's failure to allege that she was prejudiced by defendant's conduct, defendant's motion for a stay and to compel arbitration is granted. An appropriate order follows.

1. Defendant, Bank One, joins defendant DWR's motion to stay and to compel arbitration. (DRW's motion to stay, para. 3).

2. The federal Arbitration Act applies to any "contract evidencing a transaction involving commerce." 9 U.S.C. Section 2. The act applies to the contract at issue here. The plaintiff is a Pennsylvania resident. Defendant DWR is a New York corporation. Money belonging to plaintiff was transferred by DWR to Bank One for deposit in Ohio.

3. Plaintiff's argument by analogy to warrant of attorney clauses that the arbitration clause is invalid because her signature appears on the page preceeding the arbitration clause is meritless. Although Pennsylvania law does provide that the signature of the one to be bound by a warrant of attorney must appear in direct relation to the warrant provision, general and signed to be enforceable. L.B. Foster Co. v. Tri-W Construction Co., 409 Pa. 318, 186 A.2d 18 (1962). An

arbitration clause is easily distinguished from a warrant of attorney clause. A warrant of attorney clause totally forecloses the signing party from bringing an action, while an arbitration clause merely offers a different route for dispute resolution.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGINIA A. BROBST	°	CIVIL ACTION
vs.	°	
DEAN WITTER REYNOLDS INC., et al.	°	NO: 87-6077

ORDER

HUYETT, J. December 4, 1987

Upon consideration of defendant Dean Witter Reynold's motion to stay, plaintiff's response and the parties supporting memoranda, and because of the reasons stated in the attached memorandum, IT IS ORDERED that the motion is granted.

IT IS SO ORDERED.

/S/ Daniel H. Huyett, 3rd J.
Daniel H. Huyett, 3rd, Judge

§1291. Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

§1292. Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice of judge of a court which has jurisdiction.

)As amended May 24, 1949, C. 139, §90, 63 Stat. 102).

Active Assets Account
DWR ACCT NO:_____

SECURITIES ACCOUNT AGREEMENT

In consideration of Dean Witter Reynolds Inc. ("DWR") accepting one or more accounts of and agreeing to act as brokers for me in the purchase or sale of securities, I hereby agree as follows:

Applicable Rules and Regulations

All transactions entered into under this agreement shall be subject to the constitution, rules, regulations, customs and usages of the exchange or market, and its clearing house if any, where such transactions are executed by DWR or its agents and, to all applicable laws and rules and regulations of governmental authorities and self-regulatory agencies. If any statute is enacted that would be inconsistent with any of the provisions of this agreement shall remain in effect. Except as herein provided, no provision of this agreement may be waived, altered, modified or amended

unless the same is in writing and signed by an authroized official of DWR.

Security Interest/Hypothecation (Pledge)

All monies, secutities, commodities or other property which DWR may at any time be carrying for me or which may at any time be in DWR's possession for any purpose, including safekeeping, shall be subject to a general lien for the discharge of all my obligations to DWR, without regard to whether or not DWR has made advances in connection with such secutities, commodities or other property, and without regard to the number of accounts I may have with DWR.

All securities and commodities or any other property now or hereafter held by DWR or carried by DWR for me [either individually or jointly with others], or deposited to secure the same, may from time to time and without notice to me be carried in DWR's general

loans and may be pledged, repledged, hypothecated, or re-hypothecated, separately or in common with other securities and commodities or any other property, for the sum due to DWR thereon or for a greater sum and without DWR retaining its possession and control for delivery a like amount of similar securities or commodities.

Margin Maintenance--Charges

I will at all times maintain such margin for accounts maintained by DWR as DWR may require from time to time and any debit balances arising in such account shall be charged interest in accordance with the DWR usual custom. At any time, upon demand by DWR, I will discharge my obligations and will promptly pay DWR any deficiency that might arise from the closing of any account. At its descretion, DWR may at any time and without notice to me apply and/or transfer any of all of my monies,

securities, commodities and/or other property interchangeably between any of my accounts.

(Terms and Conditions Continued on Reverse)
I hereby consent and agree to all of the terms and conditions of the Agreement appearing above and as continued on the reverse hereof.

SIGNATURES - INDIVIDUAL AND JOINT ACCOUNTS

X /S/ Virginia A. Brobst

LENDING AGREEMENT

To: Dean Witter Reynolds, Inc.
New York, New York

You are hereby specifically authorized to lend to yourselves, as principal or otherwise, or to others, any securities held by you on margin for any accounts of the undersigned or as collateral therefore, either separately or with other securities.

This agreement shall ensure to the benefit

of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer the account of the undersigned to any such successors or assigns.

SIGNATURES - INDIVIDUAL AND JOINT ACCOUNTS

/S/ Virgina A. Brobst

Securities Account Agreement (Terms & Conditions Continued)

LIQUIDATION

DWR is hereby authorized, in DWR's discretion, should I die, or should DWR for any reason whatsoever deem it necessary for the protection of DWR, to sell any of all of the securities and commodities or other property which may be in DWR's possession or which DWR may be carrying for my account (either individually or jointly with others), or to buy in any securities, commodities or other property of which my account or accounts may be short, or

cancel any outstanding orders in order to close out my account or accounts in whole or in part or in order to close out any commitment made on my behalf. Such sale, purchase or cancellation may be made according to DWR's judgment and may be made, at DWR's discretion, on the exchange or other market where such business is then usually transacted, or at public auction or at private sale, without advertising the same and without notice to me or to my personal representatives, and without prior tender, demand or call of any kind upon me or upon my personal representatives and DWR may purchase the whole or any part thereof free from any right of redemption, and I shall remain liable for any deficiency; it being understood that a prior tender, demand or call, or prior notice from DWR, of the time and place of such sale or purchase shall not be considered a waiver or DWR's right to sell or buy any securities and/or commodities and/or

other property held or owed to DWR by me, at any time as provided herein.

SHORT SALES/DELIVERIES

Whenever I place with DWR any sell order for short account, I will designate it as such and I hereby authorize DWR to mark such order as being "short", and when placing any order for long account, will designate it as such and hereby authorize DWR to mark such order as being "long". Any sell order which I shall designate as being for long account, as above provided, will be for securities then owned by me and, if such securities are not then deliverable by DWR from any of my accounts, the placing of such order shall constitute a representation by me that it is impracitcable for me then to deliver such securities to DWR but that I will deliver them as soon as it is possible for me to do so without undue inconvenience or expense.

In case of sale of any security, commodity, or other property at my direction and the inability of DWR to deliver the same to the purchaser by reason of my failure to supply them to DWR, I authorize DWR to borrow any security, commodity, or other property necessary to make delivery thereof and I hereby agree to be responsible for any loss which DWR may sustain thereby and any premiums which DWR may be required to pay thereon, and for any loss which DWR may sustain by reason of its inability to borrow the security, commodity, or other property sold.

COMMUNICATIONS

Communications may be sent to me at the mailing address on file with you, or at such other address as I may hereafter give in writing, and all communications so sent, whether by mail, telegraph, messenger or otherwise, shall be deemed given to me personally, whether actually received or not.

Arbitration of Controversies

Any controversy between DWR and me arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the American Arbitration Association or the Board of Arbitration of the New York Stock Exchange, as I may elect. If I do not make such election by registered mail address to DWR at DWR's main office within five (5) days after receipt of notification from DWR requesting such election, then I authorize DWR to make such election on my behalf. Any arbitration hereunder shall be before at least three arbitrators and then the award of the arbitrators, or of the majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

Governing Law

This agreement and its enforcement shall be governed by the laws of the State of New York and its provisions shall be continuous; shall cover individually and collectively all accounts which I may open or re-open with DWR, and shall enure to the benefit of DWR's present organization, and any successors, without regard to any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of DWR's present organization, and of the assigns of any successor organization, and shall be binding upon me and/or my estate, exectors, administrators, and assigns.

Representations

I hereby represent that I am of full age, that I am not an employee of an exchange, or of any corporation of which any exchange

owns a majority of the capital stock, or of a member of any exchange, or of a member firm or member corporation registered on any exchange, or of a bank, trust company, insurance company or of any corporation, firm or individual engaged in the business of dealing, either as broker or as principal, in securities, bills of exchange, acceptances or other forms of commerce paper. I further represent that no one except me (and, to the extent community property stands in the account or accounts, my spouse) has an interest in my account or accounts with DWR.

Acts of God

I understand that DWR shall not be liable for lost cause directly or indirectly by government restrictions, exchange or market rulings, suspension of trading, war, strikes or other conditions, commonly known as "acts of God", beyond DWR's control.

Joint/Several Liability

My obligation under this agreement shall be joint and several with any other individual who signs this agreement as a joint account holder.

Headnotes

The above headnotes have been inserted solely for the purpose of convenience in description and under no circumstance shall be deemed to qualify any of the rights set forth in the provisions.

Interest Charges

I hereby acknowledge receipt of the DWR statement of interest charges.

COMMONWEALTH INS. CO. v. UNDERWRITERS
Third Circuit Op. No: 88-5056
Filed May 16, 1988

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

Commonwealth Insurance Company appeals from an order of the district court staying proceedings against all defendants in these consolidated actions pending the resolution of arbitration proceedings between Commonwealth and American Centennial Insurance Company, a defendant in one of the actions. We find

that in light of the Supreme Court's recent decision in Gulfstream Aerospace Corporation v. Mayacamas Corp., 108 S.Ct 1133 (1988), we lack appellate jurisdiction. Therefore we will dismiss this appeal.

1.

This appeal arises out of two consolidated actions by plaintiff Commonwealth seeking to avoid allegedly fraudulently obtained contracts for the purchase of reinsurance from American Centennial Insurance Corporation through two of American Centennial's agents, The Underwriters Inc. and Barrett Treaty Corporation. Some of the challenged contracts contain clauses relegating to arbitration any disputes as to the construction or operation of the agreements. American Centennial, a defendant only in the action on the Underwriters' contracts, demanded arbitration pursuant to these clauses. All of the defendants in both actions moved for a stay of proceedings, pursuant to Section 3 of the Arbitration Act,

9 U.S.C. §3, pending the Commonwealth-American Centennial arbitration.

In opposition to the stay, Commonwealth claimed that its managing general agent, Fordinbridge International Ltd., exceeded its authority in entering into the contract containing the arbitration clause. The district court found that Commonwealth was unable to raise an issue of material fact as to the apparent authority of its agent to bind it to the arbitration provision. Therefore, the court found that the provision valid and ordered the stay pending arbitration. Commonwealth appealed.

Commonwealth originally predicated appellate jurisdiction on the so-called Enelow-Ettelson doctrine which made a stay of an action at law pending arbitration automatically appealable

as an injunction under 28 U.S.C. §1292(a)(1)[1] on the theory that the stay was analogous to an equitable restraint of legal proceedings. During the pendency of this appeal the Enelow-Ettelson doctrine was overruled by a unanimous Supreme Court in Gulfstream Aerospace Corp. v. Mayacamas Corp.,(Gulfstream) 108 S.Ct. 1133, 1142 (1988). In accordance with our continuing responsibility to make an independent determination of appellate jurisdiction, we ordered the parties to brief the issue of appellate jurisdiction in light of Gulfstream.

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[1]Section 1292(a)(1) provides:

> [T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States...or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

II.

Commonwealth asserts that we have appellate jurisdiction under 28 U.S.C. §1291 pursuant to the collateral-order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337, U.S. 541 (1949). Alternatively, Commonwealth requests that we exercise our discretion either to grant a permissive appeal under 28 U.S.C. §1292(b) or to treat the attempted appeal as a petition for a writ of manadamus. We examine these arguments in turn.

An order staying an action pending arbitration, entered as part of a continuing proceeding for other relief and not resulting in dismissal of the action, is not a "final decision" appealable under 28 U.S.C. §1291.[2]

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[2]Section 1291 provides in relevant part:

> The courts of appeals...shall have jurisdiction of appeals from all final decisions of the district court of the United States... except where a direct review may be had in the Supreme Court.

Rogers v. Schering Corp., 262 F.2d 180 (3rd Cir.), cert. denied, 359 U.S. 991 (1959). Commonwealth argues, however, that the stay order is appealable under the collateral-order doctrine of Cohen v. Beneficial Industrial Loan Corp. , which allows an appeal from certain orders that finally determine claimed rights which are not ingredients of the cause of action and do not require consideration with it. 337 U.S. at 546-547. In order to satisfy the collateral-order exception an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

Commonwealth relies on analogy to the facts in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983),

where a stay of federal litigation in favor of a parallel state court action was held to be appealable as a final order under §1291 and also under the collateral-order doctrine. In Moses Cone, however, there was only one issue in both the state and federal actions--arbitrability. Because the state court decision would be res judicata as to the question, there would be no further litigation in federal court. Therefore, the stay also amounted to a dismissal. The order in Moses Cone met the Cohen criterion of "effective unreviewability except by immediate appeal" because of the state court decision would finally determine the merits of the underlying dispute.

The requirement of effective unreviewability is unsatisfied by the order appealed here, however, because review of that order and the dispute resolved by it, i.e., the validity of the abitration clause, will be available upon appeal from the final judgment after arbitration

and the district court proceedings are concluded. See Rogers v. Schering Corp., 262 F.2d at 182. We find that we lack appellate jurisdiction under the language of §1291 or under the collateral-order doctrine.

III.

Commonwealth urges us to grant a permissive appeal to 28 U.S.C. §1292(b),[3] asserting that

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[3]Section 1292(b) provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materailly advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its descretion, permit an appeal to be taken from such order...

---

we have the power to hear such an appeal even in the absence of certification by the district court. This argument is contrary to the clear

statutory language of §1292(b) and we reject it. Absent a certification order by the district court, we do not have authority to hear a question pursuant to §1292(b).[4]

We recognize that interlocutory review of challenges to the validity of arbitration clauses would always have the potential to :materially advance the ultimate termination of the litigation" in accordance with §1292(b) by eliminating the time required to obtain what may be an unenforceable arbitration award. However, Congress' clear intent in the Arbitration Act was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

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[4]Appellant miscites Gillespie v. United State Steel Corp., 379 U.S. 148 (1964), as authority for its contention. In Gillespie, the statutory authority for the court's jurisdiction was, in fact, 28 U.S.C. §1291.

Moses Cohen at 22. The statutory policy is that of rapid and unobstructed enforcement of arbitration agreements. Id. at 23. Routine interlocutory appellate consideration of stays pending arbitration would frustrate both that policy and the long-standing federal policy against piecemeal review.

IV.

Finally, we decide to treat Commonwealth's notice of appeal as a petition for mandamus. The Supreme Court repeatedly has observed that manadmus is an "extraordinary remedy, to be reserved for extraordinary situations." Gulfstream, 108 S.Ct. 1133 at 1143. "[T]he party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." Id.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes

on its docket.." Landis v. North American Co., 299 U.S. 248, 254 (1936). The decision to stay litigation even amoung non-arbitrating parties pending the outcome of a related arbitration is one left to the discretion of the district court. Moses H. Cone, 460 U.S. at 20 n.23. Therefore, Commonwealth cannot show an indisputable right to proceed.

Commonwealth argues that it is entitled to a writ of mandamus because the district court abused its discretion and applied an incorrect legal standard in ordering the stay of the action against the non-arbitrating defendants. Commonwealth asserts that under Landis the district court was required to made findings as to potential damage to Commonwealth before issuing the stay order. In Landis, one legal action was stayed in favor of another which would settle issues of fact and law defining the rights of litigants in the stayed action who were not parties to the

on-going proceeding. Those objecting to the stay in Landis were parties whose rights would be determined by litigation to which they were strangers. The consideration counseling moderation in Landis do not apply in this case where the stay is to await arbitration and the party objecting to the stay is also a party to the arbitration.

In accordance with the foregoing, we find that we are without appellate jurisdiction and circumstances do not warrant allowance of a discretionary appeal or issuance of a writ of mandamus. Therefore, we will dismiss the appeal.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit